In the Supreme Court
OF THE
United States

October Term, 1943

No.

International Ladies' Garment Workers' Union (an unincorporated association); David Dubinsky (as president of said association); Frederick F. Umhey (as executive secretary of said association); and Louis Levy (as a vice-president of said association),

Petitioners,

vs.

Superior Court of the State of California, in and for the City and County of San Francisco, and Honorable Elmer Robinson, as Judge of said Court,

Respondents.

BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal, State of California,
First Appellate District, Division One.

A.

THE COURT BELOW RENDERED NO OPINION BECAUSE IT GRANTED NO HEARING. THE ONLY OPINION RENDERED WAS THAT OF THE RESPONDENT COURT.

The District Court of Appeal denied a hearing on the petition for writ of prohibition by a 2 to 1 vote. No opinion accompanied the order denying the petition. Likewise, the Supreme Court of California did not file any opinion when it denied (by a 4 to 2 vote) the petition for a transfer of the cause from the District Court of Appeal to itself. (Record, pp. 9, 25 and 50.)

The respondent Superior Court did write an opinion (filed herein as Exhibit C).

B.

STATEMENT OF JURISDICTIONAL GROUNDS.

A jurisdictional statement is set out on pages 4 to 8 of the accompanying petition for writ of certiorari, and is hereby incorporated to avoid unnecessary repetition.

C.

STATEMENT OF THE CASE.

A concise statement of the case material to this application is set forth on pages 1 to 4 of the accompanying petition.

In general, this is the principal question: Is it due process for a California Court to exercise jurisdiction over a New York labor union not resident in California with respect to alleged libels and slanders not committed by the said union in California and not arising from any business done by the said union in California?

The law is clear under decisions of this Court that a non-resident individual, partnership or foreign corporation would not be subject to such jurisdiction under the same circumstances.

The respondent Court disregarded the decisions of this Court because it characterized them as inconsistent with what it termed the "majority rule" as established by state courts and the "consensus of annotations on the subject".

Other questions are set forth in the petition and are discussed herein.

D.

SPECIFICATIONS OF ERROR TO BE ARGUED.

I. It was abuse of due process to hold the International, a labor union resident in New York, subject to the jurisdiction of a California court under circumstances which this Court has held would not render a non-resident individual or partnership or foreign corporation subject to such jurisdiction. Decisions of this Court have repeatedly held that state courts cannot take jurisdiction over non-resident individuals, partnerships or foreign corporations with respect to foreign torts where the tort does not arise out of any business alleged to have been conducted by such individuals, partnerships or corporations in such state.

II. It was error for the respondent Court to disregard the decisions of this Court merely because respondent thought those decisions contrary to the majority of State Court decisions or the so-called "consensus of annotations".

III. To sustain service upon the International in this case as to any cause of action is to deny to it due process of law.

IV. It was error to hold that the petitioning labor union was engaged in "doing business" in the State of California where its only activities were in aid of local organizations and at no time were commercial or for profit.

V. It was an abuse of due process to hold the International was within the jurisdiction of the California state courts because of acts done by the San Francisco local or its manager. There is no evidence to support the suggestion that the alleged torts arose out of business done by the International in California. Such suggestion could be justified only if the distinction between the local union and the International is ignored, and if the acts of the local are treated as if done by the International.

VI. (a) It was error to deny the motions to quash the alleged service of summons. (b) It was error to deny the writ of prohibition.

E.

ARGUMENT.

I. IT WAS ABUSE OF DUE PROCESS TO HOLD THE INTERNATIONAL, A LABOR UNION RESIDENT IN NEW YORK, SUBJECT TO THE JURISDICTION OF A CALIFORNIA COURT UNDER CIRCUMSTANCES WHICH THIS COURT HAS HELD WOULD NOT RENDER A NON-RESIDENT INDIVIDUAL OR PARTNERSHIP OR FOREIGN CORPORATION SUBJECT TO SUCH JURISDICTION.

As stated by the respondent Court (Ex. C, p. 15):

> "The major premise of defendants' contention is that the United States Supreme Court has forbade as a matter of due process of law, a State Court from assuming jurisdiction over non-resident associations or corporations upon a cause of action which did not arise within that State."

In support of this contention we relied principally upon decisions of this Court which include, among others, the following **with respect to non-resident individuals:** *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565 (1877), **with respect to non-resident partnerships:** *Flexner v. Farson* (1918), 248 U. S. 289, 63 L. Ed. 250; **with respect to foreign corporations:** *Old Wayne Mutual Life Assn. v. McDonough*, 204 U. S. 8, 51 L. Ed. 345 (1906); *Simon v. Southern Ry. Co.*, 236 U. S. 115, 59 L. Ed. 492 (1914); *Robert Mitchell Furniture Co. v. Selden Breck Cons. Co.*, 257 U. S. 213, 66 L. Ed. 201 (1921); *Chipman v. Jeffrey Co.*, 251 U. S. 373, 64 L. Ed. 311 (1920).

So far as these cases announce the rule forbidding jurisdiction over non-residents upon causes of action not arising out of local business, they are incorporated by the American Law Institute in the Restatement of the Law—Conflict of Laws. The appropriate sections read:

> "Section 86. A partnership or other unincorporated association by doing business in a state in which the partnership or association is subject to suit in the firm name, subjects itself to the jurisdiction of the state as to causes of action *arising out of the business there done.*"
>
> "Section 92. Doing Business. A state can exercise through its courts jurisdiction over a foreign corporation doing business within the state at the time of service of process as to causes of action *arising out of the business done within the state.*" (Italics supplied.)

Section 84 provides a similar rule as to individuals.

The respondent Court agreed that the cases cited supported our contention, but concluded that they had been in effect overruled by later decisions and that, in any event, the rule represents only the minority view. (Ex. C, p. 14.)

Thus it is plain that, although this Court has recognized that a non-resident individual or partnership or corporation cannot be subject to the jurisdiction of a state court with respect to a foreign cause of action not arising from business done in the state, the respondent Court has nevertheless refused to apply this rule in favor of a labor union. While the respondent Court purports to reach this discriminatory conclusion by the claim that the decisions of this Court do not state the proper rule, it is plain from the entire opinion that the respondent is influenced by its attitude against labor unions.[1]

(a) As to non-resident individuals or partnerships, this Court has repeatedly held that a state Court cannot take jurisdiction over them with respect to foreign causes of action which do not arise from business which they transact in the state. An attempt to exercise such jurisdiction violates due process.

Ever since the ruling of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565 (1877) the courts have recognized the necessity under the Constitution, for personal service on the defendant within the territorial jurisdiction of the courts.[2]

While the foreign corporation which transacted business in the state was held subject to such process upon the theory that the state could *exclude* the foreign corporation and therefore could permit it to do such business under pain of serviceability on any cause of action the doctrine was specifically rejected as to non-resident part-

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[1]This is illustrated by the fact that it charges David Dubinsky and *every* witness connected with the Union with falsehood of almost every fact. (Ex. C. p. 5.) It intimates that the International might be termed an "economic royalist" (Ex. C. p. 48) and that its activities with respect to charitable contributions, health measures, educational and dramatic matters indicates that it constitutes a "radical departure from ordinary union functions". (Pr. Op. p. 68; Ex. C, p. 50.)

[2]Story, Commentaries on the Conflict of Laws (6th ed. 1865), Section 539; Lorenzen, Story's Commentaries on the Conflict of Laws—One Hundred Years After (1934), 48 Harv. L. Rev. 15.

nerships. *Flexner v. Farson*, 248 U. S. 289, 63 L. Ed. 250 (1918).

An unincorporated association is not the creature of the state. It has no power of perpetual succession. It more nearly resembles a partnership. This Court has never passed upon the suability of non-resident labor unions or other unincorporated associations. At the very least, the same safeguards against service upon a non-resident partnership should be applied in suits brought against non-resident associations.

Under the *Flexner* case, supra, the alleged service upon the International, a non-resident unincorporated association and a labor union, must be declared invalid lest there be a deprivation of constitutional rights.

To hold differently is to repudiate the doctrine of the *Flexner* case, supra. To repudiate the doctrine of that case would mean that a non-resident labor union can be served with process in any state upon all causes of action alleged against it, irrespective of where they arose. Such a decision would make every individual member of a local union affiliated with the International serviceable with process in every state for the purpose of obtaining jurisdiction over the International and would compel the International to defend itself thousands of miles from its resident or subject itself to a foreign judgment. If the Flexner doctrine is applied, a plaintiff will still have the right to sue a non-resident partnership or association on a foreign cause of action at the place of residence of the partnership or association.

It is true that certain limitations have been thrown about the Flexner doctrine. These exceptions permit the state to serve the non-resident individual or partnership upon a cause of action emanating from their acts committed in the state. No court has held that the serving state may exercise the asserted jurisdiction here: amena-

bility upon a foreign cause not arising from defendant's domestic act.

The motorist statute cases permit service on the foreign individual upon a cause of action arising from the negligent acts of the driver in the serving state;[3] the securities statute cases allow service upon causes of action growing out of securities transactions in the state[4] and a highly respected state court has expressly limited the doctrine to a "cause of action" which "arose out of a transaction of their business in the state".[5]

The variation of the *Farson* rule in these limited situations, rests upon the concept that so far as the non-resident has benefited from the protection of the state's laws, he should be amenable to its process. He benefits as to the *local* transaction and is therefore liable as to causes arising from it, but cannot be charged upon the foreign liability that does not so arise. Section 86 of the Restatement quoted above so provides and Section 92 expresses the same rule as to foreign corporations.

The International is therefore either not suable at all in California, under the *Flexner* case, or amenable *only* upon the foreign cause of action which arises from its business transacted in the state.

Since the International is a non-resident association and since the cause of action here did not arise out of business transacted by it in California, the service of process in California upon those who have appeared specially herein was invalid and certiorari should be granted to correct the unconstitutional abuse of that process.

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[3]*Hess v. Pawloski*, 274 U. S. 352, 71 L. Ed. 1091 (1927); *Kane v. New Jersey*, 242 U. S. 160, 61 L. Ed. 222 (1916).

[4]*Davidson v. Henry L. Doherty & Co.*, 214 Ia. 739, 241 N. W. 700 (1932); *Doherty & Co. v. Goodman*, 294 U. S. 623, 79 L. Ed. 1097 (1934).

[5]*Stoner v. Higginson*, 316 Pa. 431, 175 Atl. 527 (1934).

(b) As to non-resident corporations, this Court has repeatedly held that a state Court cannot take jurisdiction over them with respect to causes of action not arising from business transacted in the state. An attempt by a state Court to exercise such jurisdiction over a foreign labor union by analogy to a foreign corporation violates due process.

While the lower Court treats the International as a corporation, there are striking differences between them. The corporation is a highly integrated mechanism for the conduct of business and exercises complete control over its employed personnel; the labor union is a loosely organized mass of individuals over whom the union has only a tenuous control. Here, however, the lower Court inverts the process, holding the labor union to a greater amenability to service than the corporation. It upheld service upon the union although this Court exempts the corporation from service under parallel circumstances.

Foreign corporations have been held subject to service upon the theory of an express appointment of an agent for service or upon a so-called implied appointment. Upon either theory the service can extend only to causes of action which arise from business transacted by the corporation in the serving state.

(1) A corporation which has made no express designation of an agent to receive service is not subject to this Court's jurisdiction upon an implied appointment of an agent as to a foreign tort not arising from business transacted in the state.

In *Old Wayne Mutual Life Association v. McDonough*, 204 U. S. 8, 51 L. Ed. 345 (1906), this Court dealt with a Pennsylvania statute which provided that no foreign insurance company could do business in Pennsylvania until it had filed with the Insurance Commissioner a designation of him or of a specified agent to receive service of process. Suit was brought against such a foreign insurance corporation by serving the Pennsylvania Insurance Commissioner. After taking judgment in Pennsyl-

vania, plaintiff sued on the judgment in Indiana. This Court held that the Pennsylvania judgment was not entitled to full faith and credit *because the service in Pennsylvania lacked due process for the reason that it related to a cause of action not arising out of business done by the insurance company in Pennsylvania.*

The holding in this case was affirmed and followed in *Simon v. Southern Railway Company,* 236 U. S. 115, 59 L. Ed. 492 (1914).

These two cases express the present rule which has been upheld many times since.[6]

(2) Even if a corporation expressly appoints an agent for service of process under 'Sections 405 and 406a of the Civil Code of California such express designation must be construed as inapplicable to a cause of action not arising in the state from business transacted within the state.

Even if the rules with respect to corporations are applied to labor unions, there certainly is not in this case any *express* appointment of an agent for service. The striking fact is that even if there were, the corporation would still not be amenable under the California statutes for foreign torts not arising from domestic business.

The rule has often been repeated that the extent of the serviceability of a foreign corporation *which appoints an agent for service depends upon the language of the statute.*[7]

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[6]*Robert Mitchell Furniture Co. v. Selden Breck Construction Co.,* 257 U. S. 213, 66 L. Ed. 201 (1921); *Chipman Ltd. v. Jeffrey Co.,* 251 U. S. 373, 64 L. Ed. 314 (1920); *Fry v. Denver & R. G. R. Co.,* 226 Fed. 893 (N. D. Cal. 1915).

[7]See *Smolik v. Philadelphia & Reading C. & I Co.,* 222 Fed. 148 (S. D. N. Y. 1915); *Bagdon v. Philadelphia & Reading C. & I. Co.,* 217 N. Y. 432, 111 N. E. 1075 (1916), and cases cited infra.

This Court has likewise often held that in interpreting such statutes a strict rule of construction must be followed in order to avoid the hardships and injustices incident to a suit in a jurisdiction other than that in which the cause of action arose.[8]

In construing a state statute the court must find that the statute purported to cover the foreign tort not arising from business transacted in the jurisdiction.

The California statutes do not purport to embrace such a tort, and the Federal District Court of California has so held. In the recent case of *Miner v. United Air Lines*, 16 F. Supp. 930 (S. D. Cal. 1936) the Court found that the California codes did not provide for service on a foreign corporation on a foreign cause of action which did not arise from business transacted in the state. To the same effect: *Fry v Denver & R. G. R. Co.*, 226 Fed. 893 (N. D. Calif. 1915).[9]

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[8]*Robert Mitchell Furniture Co. v. Selden Breck Construction Co.*, 257 U. S. 213, 66 L. Ed. 201 (1921); *Missouri Pacific Railroad Co. v. Clarendon Boat Oar Co. Inc.*, 257 U. S. 533, 66 L. Ed. 354 (1922); *Morris & Co. et al. v. Skandinavian Insurance Co.*, 279 U. S. 405, 73 L. Ed. 762 (1928); *Hughes v. Johnson Educator Food Co.*, 14 F. Supp. 999 (D. C. R. I. 1936); *Moore v. National Hotel Management Corporation*, 21 Fed. Supp. 177 (N. D. Tex. 1937).

[9]It is perfectly obvious that even an express appointment under the California statute imposes amenability only for local transactions. Section 405, Chapter 16 of the Civil Code provides that "no foreign corporation shall transact *intrastate* business" unless it files a designation; the foreign corporation upon *withdrawing* from the state "surrenders its right to transact *intrastate* business therein" (Section 406); the foreign corporation "which has transacted *intrastate* business in this state and has thereafter withdrawn from business in this state" may be served in any action "brought in this state arising out of *such* business" (Section 406a); the penalty upon the corporation for not complying with the provisions of the chapter is, aside from fine, the forfeiture of its right to "maintain any action or proceeding upon any *intrastate* business so transacted in any court of this state" (Section 408); the foreign corporation may "surrender its right to engage in business in this state". The foreign corporation then

The respondent Court's holding that the International is amenable to California jurisdiction in this case on the erroneous ground that a foreign corporation which had made an express appointment could have been held on a foriegn tort not arising from business transacted in the state is a flagrant misapplication of the doctrines of this Court and a clear abuse of due process.

II. IT WAS ERROR FOR THE RESPONDENT COURT TO DISREGARD THE DECISIONS OF THIS COURT MERELY BECAUSE RESPONDENT THOUGHT THOSE DECISIONS CONTRARY TO THE MAJORITY OF STATE COURT DECISIONS OR THE SO-CALLED "CONSENSUS OF ANNOTATIONS".

Respondent's answer to the Supreme Court rule seems to be a conglomeration of unrelated arguments that this Court "modified" its views in 1922 in the case of *Missouri Pac. RR. Co. v. Clarendon Boat Oar Co. Inc.*, 257 U. S. 533, 66 L. Ed. 354 (Ex. C, p. 16); that the lower federal courts "lean towards" a different construction (Ex. C, p. 17); that the "majority rule in the state courts" is to the contrary (Ex. C, p. 18); that the "consensus of annotations on the subject" does not approve of the holdings of those cases although recognizing "that there is a conflict". (Ex. C, pp. 18-19.)

The opinion of the respondent Court further sets forth the "lack of support" for the "minority view," which is the term it uses to characterize the decisions of this

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is accorded the right to transact local business upon the designation of the agent. Its privilege relates to local business, and its corresponding liability for service relates to that business. These sections show that it is intended to cover the foreign corporation only as to local business. If the *express* appointment in California covers only local business and causes arising therefrom, certainly the *implied* appointment cannot be more extensive; it would be absurd to hold that the actual appointment *narrowed* the amenability of the corporation to service.

Court, and insists that one Circuit Court "has rejected the Simon and Old Wayne decisions" and that other federal decisions "have refused to apply" those decisions. It concludes with the assertion that it is not bound by the substantive rule developed by this Court.

Yet, because it fails to heed the distinction made by this Court between the express and the implied appointment, the respondent Court reached the unsupportable conclusion that the *sole and only* test of the question is a matter of construction of the state statute. The lower Court says:

> "In 1922, however, the United States Supreme Court *modified* its views on the subject by adopting an entirely different approach to the problem. In *Missouri Pac. Railroad Co. v. Clarendon Boat Oar Co. Inc.*, 257 U. S. 533, 66 L. Ed. 354, the court impliedly *rejected the notion that a question of due process was involved* and on the contrary held that 'provisions for making foreign corporations subject to service in the state is a matter of legislative discretion'. It further indicated that *the whole matter was simply one of construction,* by the court, of the state statute * * *" (Opinion, p. 16.)

However, it overlooked that in *the cases which it cites the involved corporations did, pursuant to state statutes, appoint an agent for service of summons.* Naturally, this Court held that the "whole matter" in such a case turned upon the construction of the statute—the extent of the consent to service which the corporation accepted in voluntarily acting under the state statute.

The respondent Court rested its decision largely upon its distinction between a so-called statutory agent and an actual agent. The same kind of argument advanced by respondent Court was rejected as fallacious in the cases of *Fry v. Denver & R. G. R. Co.*, 226 Fed. 893, and *Farmers & Merchants Bank v. Federal Reserve Bank,*

286 Fed. 566 (D. C. E. D. Ken. 1922). While the respondent Court relies for its distinction on *Bowers*, Process and Service, it omits to mention paragraph 339 on page 500 which declares "that if there is a difference, it is so infinitesimal as to be well-nigh imperceptible".

III. TO SUSTAIN SERVICE UPON THE INTERNATIONAL IN THIS CASE AS TO ANY CAUSE OF ACTION IS TO DENY TO IT DUE PROCESS OF LAW.

We have pointed out that this Court has held that California process cannot constitutionally extend to a foreign labor union sued upon the alleged commission of a foreign tort. We now suggest that the California statutes cannot constitutionally be relied upon as the basis of service of a foreign labor union *whether that union is served upon a domestic or foreign cause of action.*

Service was attempted upon (a) a member of one of the locals in San Francisco; (b), an employee of a local board in San Francisco; and (c), upon so-called "vice-presidents" who were in California, not as such, but in connection with their jobs on local unions or boards in San Francisco. (Exhibit D, pp. 55-6.)

Although Sections 388, 382 and 411 of the California Code of Civil Procedure as well as common law doctrine have been invoked to sustain service upon the International, their application would deny to the International due process of law.

(a) To hold the International under Section 388 of the California Code of Civil Procedure is to interpret the section so that it would be unconstitutional.

Section 388 provides:

"When two or more persons, associated in any business, transact such business under a common name,

whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability."

Since the service may be made "on one or more of the associates", Section 388, *if* applicable to a foreign association, would sustain service upon such foreign association by service on a single member within the jurisdiction. In this very case Lyda Dunn, a member of the San Francisco local, and Henry Zacharin, a member of the San Francisco Joint Board, were served in order to extend California process over the International, domiciled some three thousand miles away.

The courts have condemned, as violative of due process, a statute which provides for service on associations by service upon an ordinary member of an association, and, which, as the instant statute, even seeks thereby to bind the "property of all the associates".[10]

A method of service which would hold the International, domiciled in New York, upon service of a working girl in a knitting mill in California, who may very well not notify the International of such service, violates due process of law.[11]

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[10]*Christian v. I. A. M.*, 7 F. (2d) 481 (D. C. E. D. Ky. 1925); *Singleton v. Order of Railway Conductors*, 9 F. Supp. 417 (D. C. S. D. Ill. 1935); *People v. Brotherhood of Painters*, 218 N. Y. 115, 112 N. E. 752 (1916); *McFarland v. Brotherhood of Locomotive F. and E.*, 193 La. 237, 190 So. 573 (1939); Restatement of the Law; Conflict of Laws, Sec. 75, p. 111.

[11]In the parallel situation of a foreign corporation, the courts have held that a statute which provides for service upon a foreign corporation doing business within the state by service upon a

On the other hand the application of Section 388 to a domestic association would entail no extra-state liability; thus such application of the section has been upheld. *Jardine v. Superior Court*, 213 Cal. 301, 2 Pac. (2d) 756 (1931). But the ruling as to the domestic association, although relied upon by respondent Court, has no bearing upon the case of a non-resident labor union.

Since it is axiomatic (*Bobe v. Lloyds*, 10 F. (2d) 730, C. C. A. (2d) (1926)), that a statute is not to be interpreted to effectuate an unconstitutional purpose, Section 388 must be applied only to domestic associations. Indeed, the language of Section 388 shows that such was the intent of the Legislature since it nowhere specifies foreign associations. Whenever the Legislature elsewhere in the codes has intended to include foreign associations it has specifically named them.[12]

(b) To hold the International under Section 382 of the California Code of Civil Procedure would be to deny it the protection of due process of law.

Section 382 provides:

> "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a

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public officer not charged with the duty to notify the corporation is invalid since it is not calculated to give notice to the corporations. (*King Tonopah Mining Company v. Lynch*, 232 Fed. 485 (D. C. Nev. 1916); *Knapp v. Bullock Tractor Co.*, 242 Fed. 543 (D. C. S. D. Cal. 1917).

[12]Thus the method of serving foreign corporations and joint stock companies and associations set forth in Section 411, Subdivision 2 of the California Code of Civil Procedure is specifically labelled "Foreign corporations, etc"; Section 406a of the Civil Code likewise refers specifically to service of process upon a "foreign corporation".

common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

While a class suit, under such a statute as Section 382, may constitutionally bind the members of the class *who are within the court's jurisdiction*, it cannot bind a "class", most of whose members are *without the jurisdiction*. Since, in the instant case, neither notice nor opportunity to defend was given to *non-resident members of the "class" who are not before the Court*, there is a lack of the procedural due process required in a class suit.[13]

The failure of due process in the present case is demonstrated by the fact that hundreds of thousands of members of local unions, as well as local unions, affiliated with the International, who have not been served, and who have received no notice of this suit, and will have had no opportunity personally to defend themselves, may be liable to a personal judgment against them in this action.

The attempted use of Section 382 would work another manifest abuse of due process. The "represented" defendants may never secure a proper defense because the members of the "class" have adverse and conflicting interests. The interests of the locals and the International conflict since one may be bound and not the other. Likewise, the interest of the agents (the officers) and the principals (the members) conflict since, in the event of

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[13] *Hall v. Lanning*, 91 U. S. 160, 23 L. Ed. 271 (1875); *Postal Telegraph Cable Co. v. Newport*, 247 U. S. 464, 62 L. Ed. 1215 (1917); *Flexner v. Farson*, 248 U. S. 289, 63 L. Ed. 250 (1918); *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565 (1877); *Dohany v. Rogers*, 281 U. S. 362, 74 L. Ed. 904 (1930); *Chicago B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. Ed. 979 (1896); 1 Freeman on Judgments (5th ed. 1925) Section 415; Note (1941) 26 Cornell Law Quarterly 317.

liability, the members would have an action against their agents. In such a case the class suit works a denial of due process.[14]

It may be seriously doubted whether under any circumstances a class suit may be instituted in an action at law in any state Court against a non-resident labor union which is composed of hundreds of affiliated locals scattered throughout many states of the country which in turn are composed of hundreds of thousands of members who are residents of different states.

In any event, Section 382 of the California Code can not be invoked because it is abundantly clear that this action was not commenced as a class suit. The title of the action shows that a class suit was not intended and none of the allegations essential for a class action are stated in the complaint.

(c) To hold the International under Section 411 of the Code of Civil Procedure would be to deny it protection of due process of law.

Section 411 provides as to serving a foreign corporation:

> "2. Foreign corporations, etc. If the suit is against a foreign corporation, or a non-resident joint stock company or association, doing business in this state; in the manner provided by Section 406a of the Civil Code."[15]

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[14] *Hansberry v. Lee*, 311 U. S. 32, 85 L. Ed. 22 (1939). See also *Lightle v. Kirby*, 194 Ark. 535, 108 S. W. (2d) 896 (1937); *Langson v. Goldberg*, 373 Ill. 297, 26 N. E. (2d) 111 (1940).

[15] The applicable portion of Section 406a provides as follows: "(Service of process). Process directed to any foreign corporation may be served upon such corporation by delivering a copy to the person designated as its agent for service of process or authorized to receive service of process, or to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, the general manager in this State, or the cashier or assistant cashier of a bank."

To treat the International as an entity under Section 411 of the Code of Civil Procedure and thereby to attempt to serve its non-resident members would subject a non-resident member to a possible judgment without notice and an opportunity to defend. This violates the principles of the cases cited above, and in particular the rulings of *Pennoyer v. Neff*, supra, and *Flexner v. Farson*, supra.[15a]

The section, moreover, does not apply to a foregn labor union but to a "non-resident joint stock company or association doing business in this state". That the Legislature intended to apply the section only to *joint stock associations*, such as business trusts and not to associations like labor unions, is shown by the fact that the words "joint stock" modifies the word "association", by the fact that the "a" before the "non-resident" modifies both "company" and "association" and by the fact that the comma comes after the word "association".

We submit that the statute should not be given an interpretation which would render it unconstitutional when the direct interpretation would effect no such result.

(d) To hold the International may be served at common law would be to deny it the protection of due process of law.

A foreign labor union is not amenable to the jurisdiction of the serving state at common law. Not only is the general rule clear that a labor union cannot be sued by service upon it in its common name (63 C. J. Trade Unions, Section 91; Teller, Labor Disputes and Collective Bargaining, 1362, Section 462) but the attempt to extend the serving state's process to non-resident members of the

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[15a]The application of § 411 is patently violative of due process in this case since the so-called "vice-presidents" were not acting as such nor upon behalf of the International in California. (Exh. D, pp. 55-6, 567, 917.) The service is void on this ground alone. (*Knapp v. Bullock Tractor Co.*, 242 Fed. 543 (S. D. Cal. (1917); *McFarland v. Brotherhood of Locomotive F. & E.*, 193 La. 237, 190 So. 573 (1939).)

association, through such a device, would violate the principles discussed above. Such an attempt is a clear violation of procedural due process. (*Pennoyer v. Neff*, supra; *Flexner v. Farson*, supra.)

IV. IT WAS ERROR TO HOLD THAT THE PETITIONING LABOR UNION AS SUCH WAS ENGAGED IN "DOING BUSINESS" IN THE STATE OF CALIFORNIA WHERE ITS ONLY ACTIVITIES WERE IN AID OF LOCAL ORGANIZATIONS AND AT NO TIME WERE COMMERCIAL OR FOR PROFIT.

The uncontradicted affidavit of David Dubinsky and other testimony in the case is to the effect that the International did not engage in business for profit in the State of California or elsewhere and that the International was not and did not do business of any kind in California (Ex. D, pp. 557, 37, 45, 57-8, 2045.)

Due process forbids the exercise of jurisdiction by a state over a labor union which does no business within its borders. The term "business" refers to industrial enterprises or activity.[16]

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[16] *Westor Theatres v. Warner Bros. Pictures*, 41 Fed. Supp. 757 (D. C. N. J. 1941); *St. Paul Typothetae v. St. Paul Bookbinders' Union* (1905), 94 Minn. 351, 102 N. W. 725; *Finance etc. Co. v. Sacramento* (1928), 204 Cal. 491, 493, 269 Pac. 167 (1928).

V. IT WAS AN ABUSE OF DUE PROCESS FOR THE RESPONDENT COURT TO HOLD THAT THE INTERNATIONAL WAS WITHIN THE JURISDICTION OF THE CALIFORNIA STATE COURTS BECAUSE OF ACTS DONE BY THE SAN FRANCISCO LOCAL OR ITS MANAGER. THERE IS NO EVIDENCE TO SUPPORT THE PROPOSITION THAT THE ALLEGED TORTS AROSE OUT OF BUSINESS DONE BY THE INTERNATIONAL IN CALIFORNIA. SUCH SUGGESTION COULD BE JUSTIFIED ONLY IF THE DISTINCTION BETWEEN THE LOCAL UNION AND THE INTERNATIONAL IS IGNORED, AND IF THE ACTS OF THE LOCAL ARE TREATED AS IF DONE BY THE INTERNATIONAL.

Apparently the respondent Court recognized that it was in error in refusing to follow the decisions of this Court which hold that a state Court may not exercise jurisdiction over non-residents as to a foreign tort which does not arise from business they transact in the state.

Although its entire opinion treats the causes of action as foreign torts, the respondent Court attempts to bolster the decision by an alternative hypothesis based on alleged factual grounds. It intimates by the use of general language that the torts may have arisen out of activities by the International in California. But this attempt to suggest a factual basis for the decision fails in the face of the uncontradicted evidence.[17] Jurisdiction can not be supported by "facts" contrary to the record.

The Court's misstatement of the facts rests on two fundamental confusions.

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[17]All of the evidence on the matters discussed herein came from officers or employees of the International or its locals or from material published by them. The broad assertions by the Court are mere conclusions of law from uncontradicted facts, and hence, under general principles, are not binding on this Court. Furthermore, under California law the statements in the opinion do not constitute statements of fact binding upon Appellate Courts, and there were no express findings of fact filed. *Re Lasker*, 51 Cal. App. (2d) 120, 121-2, 124 Pac. (2d) 72 (1942); *DeCou v. Howel*, 190 Cal. 741, 214 Pac. 444 (1923).

First, the respondent Court ignores the difference between the local in San Francisco and the International and treats the acts of the local and its manager as though they were committed by the International.

Second, the respondent Court refers to various activities by the International or its supposed representatives in California and by merging and consolidating them with the *acts of the local* declares in general terms that the libels arose out of the activities by the International in California. We shall review these two matters under the following heading:

(a) The San Francisco local and the New York International are separate and distinct organizations.

(b) The alleged libels did not arise out of transactions of the International in California.

(a) The San Francisco local and the New York International are separate and distinct organizations.

Under the Constitution and practice of the International, the locals affiliated with the International are separate autonomous units. This appears from the uncontradicted affidavit of President David Dubinsky. (Ex. D, pp. 2022-2024, 2029-2042.)[18] The corporation recognized this by naming and suing the locals as associations separate from the International and by correspondence, negotiations and contractual negotiations with the local. (See footnote 18.)

[18]In its opinion (Ex. C, p. 6) the respondent Court characterized this affidavit as "replete with expressions of opinion, conclusions and arguments and obvious misstatements, part-truths and distortions of fact". However, the Constitution of the International is in evidence (Defendant's Ex. No. 14) and an examination of it will show that President Dubinsky construed that Constitution with accuracy and authority. In fact the corporation sued the International and its locals as separate associations (see Complaint, Ex. A, and paragraphs II, VI, VII, etc.) and its correspondence was addressed to the local (e. g. Plaintiff's Exs. 56, 38, 32, 37 and Defendant's Exs. 39, 36, 34, 35.) The complaint refers to contractual relations with Local 191 (Ex. A, pp. 16-17, and 19, and Ex. D, pp. 1672, 1684, 1706, 1701, 1712.)

As a matter of law, under these circumstances, the local union must be regarded as a separate and distinct identity from the national union with which it is affiliated.[19]

(b) The alleged libels did not arise out of transactions of the International in California.

1. The respondent Court states the libels *originated* with the strike, i. e., were "in furtherance of a strike declared in California against plaintiff San Francisco factory * * * *a strike declared by the local* * * * (Ex. C, p. 28.) The libels, then, did *not* originate from or arise from a transaction by the International.

2. The strike in California was called and conducted exclusively by Local 191 in San Francisco. (Ex. D, pp. 2048-9, 1843, 1861-3.) The International had nothing to do with the calling or conduct of the strike (Ex. D, pp.

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[19] *Christian v. I. A. M.*, 7 F. (2d) 481 (N. D. Kan. 1925); *Singleton v. Order of Railway Conductors*, 9 F. Supp. 417 (S. D. Ill. 1935); *People v. Brotherhood of Painters*, 218 N. Y. 115, 112 N. E. 752 (1916); *McFarland v. Brotherhood of Locomotive F. & E.*, 193 La. 237, 190 So. 573 (1939); *Dean v. International Longshoremen*, 17 Fed. Supp. 748 (W. D. La., 1936); *Milk Wagon Drivers Union v. Associated Milk Dealers*, 42 F. Supp. 584 (N. D. Ill. 1941); *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 393-396, 42 S. Ct. 570, 66 L. Ed. 975, 27 A. L. R. 762; *Truck Drivers Local No. 421 etc. v. United States*, 128 F. (2d) 227.

In *People v. Brotherhood of Painters*, 112 N. E. 752, 753, the Court says: ". . . the hypothesis that these three respondents (the foreign Bros., the local District Council, and the local Union) are to be considered as a single entity is negatived by the allegations of the petition of the realtor which clearly sets forth the separate existence of each, and prayed that a mandamus should issue against each of the respondents."

Indeed this Court has refused to merge the identities of parent and subsidiary corporations for purposes of service of process despite the domination of the subsidiary by the parent. (See *Peterson v. Chicago, Rock Island & Pacific Railway* (1907), 205 U. S. 364, 27 Sup. Ct. 513, 51 L. Ed. 851; *People's Tobacco Co. Ltd. v. American Tobacco Co.* (1918), 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587; *Cannon Mfg. Co. v. Cudahy Packing Co.* (1925), 267 U. S. 333, 45 Sup. Ct. 250, 69 L. Ed. 634.

California by statute has a similar rule. California Civil Code, Sec. 407.

61-64) although it did (as permitted by its Constitution) advance relief funds for unemployed strikers.

3. The only connection of the International with the San Francisco strike is the fact that in June, 1940, its convention approved the boycott invoked by the San Francisco local against the corporation. This convention was in New York City. If the International can be charged with any acts, those acts took place in New York.[19a]

This is corroborated by the uncontradicted affidavit of President David Dubinsky (Ex. D, pp. 61-62, 2051) which states in part:

> "Whatever activities were engaged in by the International Ladies' Garment Workers' Union in connection with the strike against Gantner & Mattern were done outside of the boundaries of the State of California."

4. So far as the alleged libels themselves are concerned no evidence was introduced to show participation by the International in a single libel.[20] There was no showing of a single act done by the International as such in the State of California in connection therewith.

5. The attempt to charge the International with the acts of certain persons in California as "representatives" of the International is contrary to the uncontradicted record. These persons are Matyas, Zacharin, Feinberg, Wishnak and Dubinsky. With the exception of Matyas

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[19a]California Courts do not hold such action illegal. (*Parkinson v. Building Trades Council*, 154 Cal. 581, 98 Pac. 1027 (1908).) The New York resolution approved the boycott "conducted in such states where the same is lawful * * * and that there be given full and complete publicity everywhere to the facts involved in the dispute".

[20]The complaint (although not offered in evidence) does not charge the International specifically with the commission of any libel and none of the 91 exhibits annexed to the complaint purport to be libels issued or committed by the International.

none is charged with involvement in the strike or the libels. At the most, they participated in various efforts from 1937 to 1941 to conciliate the controversy. The libels are alleged to have commenced April, 1940.

6. Miss Matyas was the manager of Local 191 in San Francisco, and, as such, participated fully in the conduct of the strike. Although the corporation expressly named her in the complaint as such manager (Ex. A, p. 4) the respondent Court treated her as the employee of the International and repeatedly refers to her acts as those of the International. However, her activities were always under the direction of the local and not under the International. (Ex. D, pp. 1821, 1823, 1843, 1846-7.) Although Miss Matyas received her salary from the International in accord with the practice of the latter to lend assistance to locals with need therefor (Ex. D. pp. 543, 1860, 1868, 1918), she was responsible to the local, as the International cannot appoint a manager for a local union (Ex. D, pp. 571, 525), and received her instructions from the local exclusively. (Ex. D, pp. 1820-1821, 1823, 1825-6, 1840, 1843, 1896, 146-7, 1059, 1055-6, 2048, 568, 530-1.) She did not purport to act on behalf of the International. (Ex. D, pp. 1824, 1826-8, 1854, 1859, 51.) Her testimony is corroborated by President David Dubinsky (Ex. D, p. 51), by the manager of the San Francisco Joint Board (T. p. 1218) and by one of the local strikers. (pp. 1056-8.) There is no testimony to the contrary.

As a matter of elementary law, the fact that Miss Matyas as manager of Local 191 received her wages from the International does not make the International responsible for her acts as the local's employee. Thus, it is well established that where a general employer lends his employee to another, and the employee is under the control

of the latter, the person controlling the employee and not the person paying him is responsible for his acts.[21]

7. There is another reason why the International cannot be held as principal for the acts of Matyas, Nelson or the other alleged representatives. The principal's liability for the acts of the agent is determined by the law of the place of appointment; here, the State of New York. Section 6 of the New York Civil Practice Act provides in part:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute * * * shall be held responsible or liable in any civil action at law * * * for the unlawful acts of individual officers, members or agents, except upon proof by the weight of evidence, and without the aid of any presumptions of law or fact, of (a) the doing of such acts by persons, who are officers, members or agents of any such association or organization, and (b) actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof by such association or organization."
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> *Clevenger's Supreme Court Practice* (1941, New York), Sec. 876, sub. 6.

In order for the International to be bound under New York law by the acts of Matyas (in San Francisco), Nelson (in New York) or any one else purporting to represent it, there must be proof by the weight of evidence and without the aid of any presumption of law or fact of two requirements: (1) the doing of the acts by officers, members or agents of the association, and (2) actual partici-

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[21] 35 *Am. Jur.* 970, Sec. 541; *Burns v. Jackson* (1922), 59 Cal. App. 662, 211 Pac. 821; *Lowell v. Harris*, 24 Cal. App. (2d) 70, 74 P. (2d) 551 (1937); *Peters v. United Studios*, 98 Cal. App. 373, 277 Pac. 156 (1929).

pation in or actual authorization of the acts or ratification after actual knowledge of the acts by the association.

There was no attempt to prove, and indeed not the slightest evidence, that there was an actual authorization of the acts of Matyas, Nelson or the other alleged representatives, or a ratification of the acts after knowledge of them by the International. Neither was there proof that Matyas or Nelson acted as an officer, member or agent of the International with respect to the conduct which the Court described.

Under these circumstances, it is obvious that there is nothing in the record to support any general statements by the respondent Court that the International as such had anything to do with the libels which are the basis of suit. In view of the absence of facts to support such general statements it should be pointed out that under California law the burden of proof on the motion to quash service of summons was upon the corporation.[22]

It is thus apparent that there is no evidence to support the general statements that the libels and slanders arose out of the business of the International in California. The Court does not refer to any such acts by the International except by disregarding the distinction between the local and the International and except by treating the manager of the local as the employee of the International, although the uncontradicated evidence is to the contrary.

If the distinction between the International and the local is obliterated, the rules protecting a non-resident association from service would be completely abrogated.

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[22]*Fuller v. Lindenbaum*, 29 Cal. App. (2d) 227, 84 Pac. (2d) 155 (1938); *Jameson v. Simond Saw Co.*, 2 Cal. App. 582, 84 Pac. 289 (1906).

VI.(a) IT WAS ERROR TO DENY THE MOTIONS TO QUASH THE ALLEGED SERVICE OF SUMMONS. (b) IT WAS ERROR TO DENY THE WRIT OF PROHIBITION.

CONCLUSION.

The petition for certiorari should be granted.

Dated, San Francisco, California,
January 7, 1944.

Respectfully submitted,
EMIL SCHLESINGER,
S. HASKET DERBY,
JOSEPH C. SHARP,
Attorneys for Petitioners.

MATHEW O. TOBRINER,
DERBY, SHARP, QUINBY & TWEEDT,
Of Counsel.